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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON MATHEW WIENER,

Defendant and Appellant.

B206604

(Los Angeles County  
Super. Ct. No. SA063887)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia Rayvis, Judge. Reversed in part and affirmed in part.

Marks & Brooklier, Donald B. Marks and Elizabeth A. Marks for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey, Stacy S. Schwartz and Carlos Dominquez, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

After defendant and appellant Aaron Wiener and his girlfriend, Lorena Meza, ended their relationship, they fought over her laptop computer. That fight ultimately led to defendant's nolo contendere plea to corporal injury to a spouse/cohabitant/child's parent. The disagreement between defendant and Meza, however, continued at the restitution hearing. This time the subject was Charlie, a dog Meza had bought but which lived with defendant. The trial court ordered defendant to give Charlie to Meza as restitution, as well as to pay for a replacement computer. Defendant contends on appeal that the court erred by awarding this restitution. We agree that the court abused its discretion by ordering defendant to give the dog to Meza, but that the monetary award for the computer was proper. We therefore reverse the judgment in part.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Factual background.<sup>1</sup>**

Defendant and Lorena Meza began dating in April 2006. They lived at defendant's condominium from about June 2006 to January 2007, when they broke up and Meza moved out. In March 2007, Meza was at Best Buy to fix her laptop computer. Defendant showed up and tried to stop her from getting into her car. He took her computer and possibly her purse. Later that same day, Meza met defendant at his apartment, and he returned her things.

The next day, March 6, 2007, Meza was at work. Defendant approached her in a stairwell and grabbed her. She was holding her laptop computer. Meza felt defendant's hand, and then she fell, suffering bruises and scratches. Defendant took her computer. A few days later, defendant's parents sent Meza's computer back to her, but all of her files had been deleted.

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<sup>1</sup> The factual background is from the preliminary hearing.

Defendant told an officer that he went to Meza's office and took the computer to retrieve software he had installed on it.

## **II. Procedural background.**

An information was filed on November 1, 2007 charging defendant with count 1, second degree robbery (Pen. Code, § 211)<sup>2</sup> and count 2, corporal injury to spouse/cohabitant/child's parent (§ 273.5, subd. (a)). On December 14, defendant pled nolo contendere to count 2. That same day, the court sentenced him to five years' probation on the condition, among others, he spend one day in jail.

## **DISCUSSION**

### **I. The restitution order directing defendant to give the dog to Meza and to pay for a replacement computer.**

#### *A. Additional facts.*

On January 17 and 23, 2008, the trial court held a restitution hearing. Meza testified that defendant had her dog, Charlie, which she bought for \$1,000. Charlie lived with them at defendant's condominium. Although Meza moved out of defendant's home in January or February 2007, she could not remember if Charlie came with her. During the course of the case, defendant called Meza to tell her Charlie was sick, dead, and she needed to come over because Charlie was sick. Although she asked defendant to return Charlie, he refused. The court said, "[I]t clearly appears to this court that this dog was taken as a result of the defendant's acts that are the basis of 11350 [sic] belongs to the victim. She bought the dog and the dog is to be returned to her."

Meza also asked for \$3,201.03 in lost computer equipment: \$29 for a charge to Best Buy; \$119 for software; \$201 for additional software; and \$1,215.15 for a replacement laptop. Although defendant returned her computer to her, she had to replace all the software. Her original computer was a PC, but the replacement computer was an

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<sup>2</sup> All further undesignated statutory references are to the Penal Code.

Apple. After defendant returned her original computer, it “didn’t work at all.” She was told that “maybe for a smaller fee” it could be fixed, but Meza wanted to start “new. I didn’t want to deal with him. So I just replaced the whole thing so I could just put it all behind me.” The trial court said, “[T]he victim had to buy a new computer. The laptop that was returned to her did not work. She could have had it fixed, but there’s no requirement that she had to do that. She was entitled to buy a new laptop and the programs for it. If she chose to switch from a PC to a MAC, that is inconsequential. She has a right to do that. The bottom line is she’s replacing her stolen computer and the programs that were taken.” The court therefore awarded \$119 for software plus \$201 for software plus \$1,215.15 for a replacement laptop. The court did not award \$29 for a charge to Best Buy, because the charge was incurred before the crime occurred.

Defendant now appeals only those portions of the restitution order pertaining to the dog and to the replacement of the laptop computer and software.<sup>3</sup>

B. *The trial court abused its discretion by ordering defendant to give the dog to Meza.*

The California Constitution provides that “all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Section 1202.4, subdivision (f)(3), provides that a victim restitution award “shall be of a *dollar amount* that is sufficient to fully reimburse the victim . . . for every determined *economic loss* incurred as the result of the defendant’s criminal conduct, . . .” (Italics added; see also § 1202.4, subd. (a)(1) [“a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly

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<sup>3</sup> Other amounts were awarded in restitution, but defendant does not challenge them.

from any defendant convicted of that crime”];see *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1135-1136.) “[R]estitution ordered on dismissed counts is valid provided the plea under which payment of restitution is made a condition was ‘freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court.’ ” (*People v. Beck* (1993) 17 Cal.App.4th 209, 216.) An order to pay restitution is a money judgment, enforceable in the same manner as any other money judgment. (§§ 1202.4, subd. (i), 1214, subd. (b).)

Statutory provisions concerning the right to restitution “have been broadly and liberally construed.” (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1525.) “The trial ‘court’s allocation of restitutionary responsibility must be sustained unless it constitutes an abuse of discretion or rests upon a demonstrable error of law.’ ” (*People v. Draut* (1999) 73 Cal.App.4th 577, 581, quoting *In re S.S.* (1995) 37 Cal.App.4th 543, 550.) “A trial court abuses its discretion when it determines an award amount using other than ‘a rational method that could reasonably be said to make the victim whole’ or when an award is arbitrary or capricious.” (*Draut*, at p. 582, quoting *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.)

Although the right to restitution is broadly and liberally construed, restitution, as it has been statutorily defined, pertains to *monetary* amounts and is designed to compensate victims for economic losses. Statutory examples of losses subject to restitution include the value of stolen or damaged property; medical expenses; wages or profits lost due to injury incurred or lost by the victim; noneconomic losses including but not limited to psychological harm for felony violations of section 288; and relocation expenses. (§ 1202.4, subd. (f)(3).) Here, the trial court ordered defendant to compensate Meza for these types of losses. But the court also ordered defendant to give a dog to Meza. The dog does not fall under these statutory examples nor can the examples be broadly interpreted to include a dog. The counts with which defendant was charged (second degree robbery and corporal injury to Meza) arose out of defendant taking a computer from Meza; they did not arise out of or were related to the dog. The dog therefore is not a proper subject of restitution.

The People tacitly concede the point by failing to address defendant's argument that Charlie was not a proper item of restitution. The People instead argue that giving Charlie to Meza was a proper condition of probation. We see at least two problems with this argument. First, the trial court's order concerning Charlie was issued at the restitution hearing and in the context of restitution, not in the context of setting the terms of probation. Second, although courts have broad discretion in setting the conditions of probation, that discretion "nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute. In addition, we have interpreted Penal Code section 1203.1 to require that probation conditions which regulate conduct 'not itself criminal' be 'reasonably related to the crime of which the defendant was convicted or to future criminality.' (*People v. Lent* [(1975)] 15 Cal.3d 481, 486.) As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or " 'exceeds the bounds of reason, all of the circumstances being considered.' " [Citations.]' [Citation.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) A condition of probation thus is an abuse of discretion if it " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486.)

As to the first element, the People argue that Charlie is related to defendant's crime because defendant, after he and Meza broke up, used the dog to hurt her: he told Meza the dog was sick or dead. As wayward as this conduct may be, it does not make the dog somehow related to defendant's crimes. The dog was neither related to the alleged robbery of the computer nor to the injury Meza sustained when defendant forcibly took the computer from her. Second, defendant keeping the dog is not itself criminal. Charlie and Meza lived with defendant. It appears that Meza left the dog at defendant's condominium when she moved out. In any event, at the restitution hearing,

Meza was unable to clearly account for how Charlie ended up with defendant. But there was no allegation he stole the dog or otherwise engaged in criminal conduct in connection with it. It follows, third, that the court's order requires conduct not reasonably related to future criminality. The People baldly state that returning the dog is reasonably related to preventing future criminality, but the People fail to specify how.

We therefore conclude that the trial court abused its discretion by ordering defendant to give Charlie to Meza.

## **II. The restitution order regarding the computer.**

Unlike that portion of the trial court's order directing defendant to give Charlie to Meza, the trial court did not abuse its discretion by ordering defendant to compensate Meza for her computer. The court ordered defendant to pay Meza \$1,215.15 to replace her laptop computer plus \$320 for software, for a total of \$1,535.15. The crux of defendant's argument regarding why he should not be responsible for the replacement value of the computer is he returned her old one and there is no evidence it could not be fixed. He relies on Meza's testimony that she had been told her computer could be fixed "maybe for a smaller fee." Defendant, however, had the burden of proving that the victim's restitution estimate exceeds the replacement or repair cost. (See *People v. Goulart* (1990) 224 Cal.App.3d 71, 83; *People v. Hartley* (1984) 163 Cal.App.3d 126, 130.) Although Meza referred to fixing her old computer for a small fee, defendant never clearly established that the repair cost was less than the replacement cost. He therefore failed to satisfy his burden of proof.

**DISPOSITION**

The order directing defendant to return the dog to Meza is reversed. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.